

## **JUSTICE COMMITTEE**

### **HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL**

#### **SUBMISSION FROM THE SCOTTISH LIBERTARIAN PARTY**

The Scottish Libertarian party would like to thank the Scottish Government for the opportunity to share our views on the new Hate Crime and Public Order (Scotland) Bill. We hope that they will be taken on board. We have set out our points under the relevant section headings and have included our general remarks in the section below.

#### **General Remarks**

The Scottish Libertarian party feel strongly that there is no need for new legislation concerning hate crime and we consider this bill to be unduly wide in application and without adequate safeguards for the individual. We believe it is liable to lead to self-censorship as people and companies attempt to avoid prosecution. We also feel that it deviates from existing Scots law principles and would not sit well within the body of Scots criminal law as a whole.

We understand also that women are not a protected group in this bill, but that they will be either added later, or misogyny will be granted its own statute. We note also that the bill is viewed as sending a signal to society. Given this, and the absence of any mention of misandry as an offence or of men as a protected group, we would ask the Scottish Government what signal this sends?

More broadly we wonder why any group is deemed worthy of special status. This seems to suggest that some people are less worthy of legal protection than others. Such discrimination undermines the bill's supposedly noble intentions entirely.

We believe that treating "hate" (or "hatred") as a crime in this way isn't appropriate in the Scots legal system. To establish a crime, Scots law looks first at the act that was committed and then at the mental component. For the latter it has been quite clear in distinguishing between "intent" and "motive". "Intent" is whether you mean to do what you do, and whether you are conscious of what you do. "Motive" is merely why you choose to do what you do. In determining a crime, what is relevant is what a person does and whether he means to do it. Not what he thinks or why he does it.

Nevertheless, there is no reason that hatred could not be considered in sentencing. We feel this is the most appropriate place to consider it. Hatred of specific groups should not be given a status above that of other considerations, however. And it is clearly not only the accused's opinion of his victim which is

relevant. A killer who tortures and cannibalises his victim is no better because he only does it to white men. All factors ought to be considered in sentencing but not in determining whether a crime has been committed.

### **Sections 1 Aggravation of offences by prejudice & 2 Consequences of aggravation by prejudice**

We believe corroboration ought to be retained and should apply in section 1. Corroboration still plays a key role in Scotland and, whilst it could be removed if there were sufficient safeguards against wrongful conviction, there are none set out in this bill.

On the other hand, the judge may consider all circumstances and factors at sentencing and need not require corroboration for the facts he considers. But if hatred is a fact to be established in court as pertaining to the offence, it should require the same standard of evidence as any other fact. As such the bill ought to keep corroboration.

A further criticism is that removing corroboration will enable prosecution by denunciation. Ironically, a victim who bears ill will towards the accused could quite easily make a false accusation of “hate crime” against the accused simply to heap more misery upon him. We feel corroboration is needed to prevent this.

### **Sections 3 Offences of stirring up hatred & 5 Offences of possessing inflammatory material**

Sections 3 and 5 are preposterous, since no-one has a right not to be offended. Hurt feelings are not a crime and there is no reason why any specific group ought to be treated preferentially or why it is worse to offend a black lady with one leg than a white heterosexual man.

For section 3, if you don't like the words that someone uses to whip-up hatred, you are free to argue to the contrary. Nick Griffin's appearance on Question Time when he was leader of the BNP did himself and his party no favour. There is no need to criminalise speech when debate works just as effectively.

For section 5, you can simply not read what offends you. Or, you can produce your own materials to refute views you disagree with.

We note that sections 3 and 5 create strict liability offences. We feel that the use of strict liability should be resisted. It will always appeal to governments as it makes prosecution significantly simpler. But it criminalises people without guilty minds. If you are to create a criminal offence, at least have a mens rea of “intention or recklessness”. For section 5, especially, it is unfair to criminalise possession of material without intention or even recklessness since this makes potentially millions of people in this country into criminals overnight, when their

copies of Huckleberry Finn or DVD of Little Britain become offensive material. This is especially egregious where the offensive material lies in an attic gathering dust, with the possessor unwittingly a criminal.

It is insufficient to make it a criminal offence and then to provide a defence that the possession is "reasonable." Not only is reasonable undefined (making possession a rather risky business) but people should not go through life ostensibly as criminals but clinging to the hope that, should they ever be arrested, they'd have a legitimate defence.

Supplementary to this, and part of the problem, is that "inflammatory material" is ill defined – though I think that is the intention. The ambiguity will lead to a spirit of book burning as libraries take no chances in purging their collections of anything they think might be offensive.

### **Section 9 Corporate liability and liability of officers**

In considering corporate criminal liability, we refer to the case of HMA v Transco. We note the difficulties in prosecuting companies and we recognise that the reason no legislative solution has been devised is that it would be incompatible with the principles of Scots law. The solution presented by this bill does not solve this.

Furthermore, we see no reason why managers or secretaries should be held to be representative of the company or be held jointly liable. Nor do we understand why bringing them into this problem makes it any better? We are still left with the difficulty of establishing the "controlling mind and will of the company", something which a manager or secretary could never be held to constitute.

In terms of addressing the Transco problem, the bill does away with the mens rea of said controlling mind and replaces it with the undefined terms of "consent or connivance". We don't yet know what that means, but it is certainly a much lower standard than being the mens rea of a controlling mind.

Equally, "neglect" is not a familiar standard in Scots criminal law but seems closely related to negligence. Negligence is of course a civil matter in Scotland and not a criminal one. To be criminal, we demand a level of "recklessness". As Robson v Spiers held:

"...a high degree of culpability [is] required to be averred and proved before reckless conduct as a crime at common law could be established. Carelessness, negligence or even recklessness in general are not enough. There must, I think, be conduct deliberately done in face of potential danger to another or others in complete disregard of the consequences for him or them."

Section 9 significantly lowers the threshold of criminal conduct for companies and directors to a level that is inconsistent with Scots law. It's clear that what was held in Robson cannot apply in this case and so we would be creating a two tier criminal law: one, where standards are lowered and principles ignored so as to achieve results that progressive politicians want; and the rest, where normal service is maintained. It is unethical to do this. Not only that, but it sets a clear precedent for legislators, whereby different standards and thresholds are created depending upon how politically desirable a prosecution is or how much the government wants to threaten the public into compliance.

We understand that the purpose of this section is to prevent people using companies to do things that the bill makes criminal for individuals. However, as discussed, this section is obviously incompatible with Scots law and as such should be scrapped.

This would leave means to evade criminal liability which would undermine the law (or at least embarrass the Scottish Government). This should be taken as a cue to abandon the bill as being incompatible with the spirit and principles of Scots law.

### **Conclusion**

Having reviewed the key sections of the bill, it is the opinion of the Scottish Libertarian party that not only is the bill unnecessary, but that it is entirely inconsistent with Scots law. It also discriminates between men and women, which is ironic given its purpose. We recommend that this bill be ditched, but that if necessary, sentencing guidelines could be reviewed to ensure that vicious hatred of groups (for whatever reason) is taken into proper consideration at the sentencing stage. Otherwise, this bill should be abandoned.

Scottish Libertarian Party  
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